

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

3
4 ISAAC AVENDANO, *et al.*,

3:13-cv-00168-HDM-VPC

5 Plaintiffs,

6 v.

ORDER

7 SECURITY CONSULTANTS GROUP,

8 *et al.*,

9 Defendants.

10
11 Before the court is plaintiffs' motion for attorney fees and costs (#133). Union defendants
12 oppose the amount (#138). Plaintiffs replied (#142). For the reasons discussed herein, the court
13 grants plaintiffs' motion in the amount of \$118,720.59.

14 **I. BACKGROUND**

15 On December 2, 2014, this court ordered plaintiffs to file a motion for attorney fees
16 (#124) ("The December order"). The December order followed an earlier order to show cause
17 (#105) against union defendants and their counsel, Robert B. Kapitan ("Kapitan"). The show
18 cause order resulted from several inconsistent statements Kapitan made to the court during a year
19 of on-going motion practice relating to plaintiffs' counsel representation of plaintiffs, and also
20 professional conduct proceedings before the Ohio Supreme Court's Office of Disciplinary
21 Counsel ("ODC"), which considered disqualification of plaintiffs' counsel in fall 2013.

22 At a January 10, 2014 emergency hearing, Kapitan first misrepresented to the court the
23 status of the ODC matter. Based upon his representations, the court stayed its prior scheduling
24 and discovery orders.¹ In the following year, and as a result of his prior and continuing
25 representations, the parties engaged in time-consuming and unmeritorious motion practice—

26
27 ¹ The court acknowledges a minor error in the order (#124), as identified by plaintiffs (#133 at 2
28 n.1). The court stated in the December 2, 2014 order that plaintiffs requested a discovery stay at
the January 10, 2014 emergency hearing. (*Id.* at 4.) The court in fact imposed a stay, but it was
not at plaintiffs' request (*see* #48).

1 including a motion to disqualify, sanctions motions under Rule 11 and section 1927, and several
2 motions to seal and for *in camera* review related to exhibits to these motions. Aside from airing
3 their mutual animosities, the parties accomplished little else. Following its orders on plaintiffs'
4 sanctions motions in September 2014, the court issued a show cause order. Therein, the court
5 ordered union defendants and Kapitan to explain why they and/or he should not be sanctioned for
6 his misrepresentations about the ODC matter.

7 On December 2, 2014, the court found by clear and convincing evidence that Kapitan had
8 intentionally misrepresented the status of the ODC complaint against plaintiffs' counsel, and that
9 he further failed to comply with his ethical obligations to the court to correct his
10 misrepresentations, had they been unintentional, when several opportunities presented. Although
11 the court is loath to utilize its power to sanction counsel who appear before it, the court concluded
12 that Kapitan's conduct required its intervention. Consequently, the court awarded attorneys' fees
13 to plaintiffs and levied other sanctions, including referral to the ODC for further disciplinary
14 action as it deems appropriate.

15 As to fees, the court ordered: "Within twenty-one (21) days of the entry of this order,
16 plaintiffs shall file a motion describing costs and fees associated with: costs and fees associated
17 with: (1) filing the sanction motions; (2) responding to the court's show cause order; (3)
18 postponement of the January 2014 ENE; and (4) other costs directly attributable to Kapitan's
19 January 10 misrepresentations, as plaintiffs contemplated in their response to defendants' show
20 cause brief." (#124 at 20) (emphasis removed). Plaintiffs moved for fees, and the parties
21 submitted briefing. Having reviewed the motion and the parties' positions, this order follows.

22 II. LEGAL STANDARD

23 Calculation of reasonable attorneys' fees is a two-step process. First, the court computes
24 the "lodestar" figure, which multiplies a reasonable hourly rate by the number of hours
25 reasonably expended in the litigation. *Carter v. Caleb Brett LLC*, 757 F.3d 866, 868 (9th Cir.
26 2014). The lodestar amount is presumptively correct. *Mendez v. Cnty. of San Bernadino*, 540
27 F.3d 1109, 1129 (9th Cir. 2008). Second, and despite the presumption, the court may modify the
28 lodestar amount. *Carter*, 757 F.3d at 869 (citing *Quesada v. Thomason*, 850 F.2d 537, 539 (9th

1 Cir 1988) for the relevant factors, as first articulated in *Kerr v. Screen Extras Guild, Inc.*, 526
 2 F.2d 67 (9th Cir. 1975)). In this District, the *Kerr* factors are incorporated into Local Rule 54-16.

3 III. DISCUSSION

4 a. Summary of the Parties' Positions

5 Plaintiffs' motion seeks \$300,843.60 in fees and costs. Plaintiffs' counsel have included a
 6 timesheet (#133-3) identifying the tasks that they believe fall within the ambit of the December
 7 order, and documentation regarding certain travel costs. They seek hourly rates of \$550 for
 8 partner John A. Tucker, \$325 for associate Rachel Baldrige, and \$400 for local counsel Ian
 9 Silverberg, for hours respectively totaling 287.75, 419.30, and 13.8. (#133 at 4-5; #133-3 at 15.)
 10 The motion also requests costs of \$741.30 for adjustment of travel, and also interest on these
 11 amounts at a rate of 3.25 percent. (*Id.* at 17-18.)

12 Union defendants challenge the amount on several bases. First, they argue that
 13 recoverable fees are limited to services "directly attributable" to the January 10 statements under
 14 the terms of the December order. Defendants contend that plaintiffs' motion disregards this
 15 limitation by including services relating to discovery, the motion to disqualify, non-relevant
 16 sanctions motions, and other miscellaneous motions. (#138 at 6.) Second, they argue that
 17 counsels' invoice is inadequately "broken down" such that "there is no way to know whether time
 18 spent on the sanctions motions involved the claims for sanctions related to the January 10
 19 representations" (*Id.*) Third, and relatedly, union defendants contend that any time claimed
 20 for the Rule 11 motion is improper, and only a portion of the 1927 is recoverable. (*Id.*)

21 Fourth, they claim that the number of hours claimed is unreasonable. (*Id.* at 10-11.) Fifth,
 22 they request that no time be recoverable for the postponement of the January 2014 ENE, because
 23 postponement, in their view, "was due mainly to the filing of the Motion to Disqualify and not to
 24 the January 10 misrepresentations" (*Id.* at 11.) Sixth, union defendants argue that the hourly
 25 rates requested are not reasonable in this market. (*Id.* at 12.) Here, they argue that plaintiffs have
 26 "cherry-picked" cases in support of the requested rates, and that they, as plaintiffs' counsel,
 27 cannot rely on cases allowing higher rates for defense counsel. (*Id.*) Seventh, they argue that
 28 plaintiffs have inadequately supported and explained their request for costs attributable to travel,

1 and therefore, only \$10 in costs is appropriate. (*Id.* at 17-19.) Eighth, they argue that plaintiffs
 2 have failed to provide authority for their request for interest. (*Id.* at 19.) Finally, union
 3 defendants canvass the factors identified in LR 54-16 and, in short, argue that each support
 4 reducing the award. (*Id.* at 13-16.) At bottom, they request the court allow fees for only 8.68
 5 hours of work and costs of \$10, for a grand total of \$1,383.75.

6 **b. Analysis**

7 As a preliminary matter, the court is disappointed by the briefing of the parties. On one
 8 hand, plaintiffs move for an amount that is likely case-ending, and they include thousands of
 9 dollars in attorneys' fees that, as the court discusses more fully below, fall outside the ambit of
 10 the December order. Yet on the other hand, facing what could be draconian sanctions, union
 11 defendants remain grossly unhelpful, blithely disregarding the seriousness of this matter—even at
 12 this late juncture. Apparently unrepentant for Kapitan's conduct in this matter, union defendants
 13 provide an response to the fees motion that, despite its multiple arguments, fails to engage in
 14 detailed analysis of the invoice or to provide a rational basis by which the court can reach a
 15 determination of what is fair under the circumstances. Union defendants cannot seriously expect
 16 this court to conclude that \$1,383.75 in attorneys' fees and \$10 in costs is an appropriate sanction.

17 As has been the case throughout this litigation, the court will again shoulder alone the
 18 burden of determining the correct result without meaningful guidance from the parties. The court
 19 believes the lodestar figure is incorrect, and adjusts the award as described herein.

20 **1. Hourly Rates**

21 First, the court will allow rates in the amount of \$450 for Tucker, \$250 for Baldrige, and
 22 \$200 for local counsel Silverberg. As another court in this District recently concluded, "[r]ate
 23 determinations in other cases in the District of Nevada have found hourly rates as much as \$450
 24 for a partner and \$250 for an experienced associate to be the prevailing market rate in this
 25 forum." *Eckenrode v. Rubin & Yates, LLC*, No. 2:13-CV-00317-GMN, 2014 WL 4092266, at *7
 26 (D. Nev. July 28, 2014), *report and recommendation adopted*, 2014 WL 4072002 (D. Nev. Aug.
 27 15, 2014). The court believes that the *Eckenrode* rates are appropriate for plaintiffs' trial counsel.
 28

In addition, \$200 is an appropriate rate for Silverberg, who as local counsel has only minimal involvement in the litigation and has appeared in this court only rarely.

2. Reasonable Hours

The court has reviewed the invoice submitted by plaintiffs (#133-3) and believes it adequately describes the services associated with the fee request. However, upon reviewing the descriptions, the court has determined that services related to several items are improperly included within the request. These services relate to a motion to seal, motion for *in camera* review, and several motions to strike. The court appreciates the reasonable motivation plaintiffs' counsel might have had for undertaking this work, but none of these items falls within the precise terms of the court's December order. Accordingly, no fees shall be granted for tasks facially related to these matters.

As such, the court begins with the following hourly totals for the prescribed four categories, which the court has calculated based upon the descriptions in the invoice:

Category	Tucker Hours	Baldrige Hours
Sanction Motions	86.6	110
Show Cause Order	50.3	69.6
ENE Postponement	18.8	31.5
Other Costs Attributable to the Misrepresentations	87.9	82.5

The sanctions motion category consists of services related to the Rule 11 and section 1927 sanction motions. The show cause order consists of services related to the show cause order itself, with 28.7 hours expended by Tucker and 32.2 by Baldrige, and also preparing the fees motion, with 21.6 hours spent by Tucker and another 37.4 by Baldrige. The other costs category includes services related to filing the emergency motion in January 2014, with 12.8 hours spent by Tucker, and 10.6 by Baldrige, and litigating the motion to disqualify, with 75.1 expended by Tucker and 71.9 by Baldrige.

1 Union defendants are incorrect that the order's reference to "directly attributable" to the
2 January 10 misrepresentations is a limitation on all categories of fees; their reading of the order is
3 contrived and self-serving. The December order plainly identifies four categories. The sanctions
4 motions are separately recoverable—and rightly so, as they are sufficiently related to Kapitan's
5 misrepresentations over several months. If union defendants believed that no fees should be
6 awarded for certain sanctions motions, the proper time to raise that argument was in a motion for
7 reconsideration following the December order, which made plain that fees for the sanctions
8 motions would be awarded.

9 Moreover, the "directly attributable" category is a catch-all. In the court's view, it easily
10 and appropriately includes litigating the motion to disqualify. Kapitan's repeated remarks led the
11 court to believe that it needed to consider disqualification because the matter had not yet been
12 decided by the ODC; in other words, Kapitan's remarks intimate that bona fide, previously
13 unexamined reasons, might have existed for disqualifying plaintiffs' counsel. The December
14 order concludes that this understanding was an inaccurate one—a misunderstanding that owed
15 only to Kapitan's misrepresentations. Union defendants may have moved to disqualify of their
16 own accord. But for Kapitan's dishonest characterizations, however, the court would not have
17 delayed the timely progress of this case to facilitate review of the disqualification motion that it
18 ordered union defendants to file in January 2014. The motion to disqualify shall be recoverable
19 within the other costs category.

20 To the above sums, the court makes the following modifications. First, based upon the
21 descriptions, all services claimed for the ENE postponement relate to preparing for the ENE
22 itself—a task required by the Local Rules. As these requests are for services that predate
23 postponement, they are not recoverable under the December order. The court will allow only
24 costs for postponement, as described below. Second, for similar reasons, the court will disallow
25 any fees related to filing the emergency motion. These also predate the misrepresentations.

26 Third, the court will reduce by half Tucker's hours related to preparing the motion to
27 disqualify, the sanction motions, and the show cause order (but not those hours expended on the
28 motion for fees), as the total hours are excessive in the court's view. Plaintiffs suggest that hours

1 need not be reduced because they attempted to limit costs by limiting Tucker's role to supervision
2 and strategy, while using Baldrige, "an associate with a lower billing rate," to draft and research.
3 (#133 at 3.) The invoice and request conflict with that explanation. The hour totals of the two
4 attorneys are similar, and several descriptions suggest that Tucker took an involved role in
5 drafting and research. In absence of union defendants' proposal for a more exact method of
6 reduction and accounting for possible duplication of efforts, the court will accept plaintiffs'
7 characterization of the attorneys' work and allow fee recovery commensurate with the stated goal.
8 To do so, the court reduces Tucker's hours to 43.3 for the sanctions motions, 36 for the show
9 cause order, and to 37.6 for the "other costs."

10 Under these reductions, the court therefore awards the following sums in attorney fees.
11 First, for Tucker's 116.9 hours of services at \$450 per hour, an amount of \$52,605. Second, for
12 251.5 hours of Baldrige's work at \$250 per hour, a sum of \$62,875. Third, for 13.8 hours of
13 Silverberg's time at \$200 per hour, a total of \$2,760. Therefore, the grand total of attorney fees to
14 plaintiffs shall be \$118,240. This figure is based upon reasonable rates for a reasonable number
15 of hours, as determined by the foregoing considerations. The court declines to make additional
16 modifications to these amounts based upon the *Kerr* factors, as union defendants' arguments on
17 these factors are conclusory and unpersuasive. The court further declines to award fees to
18 plaintiffs for the preparation of the reply brief. (*See* #142 at 20.)

19 **3. Costs**

20 The court awards \$480.59 in costs related to the ENE postponement. These result from
21 last minute flight changes that plaintiffs' counsel have documented. The court declines to award
22 \$260.71, as requested, for cancellation of a rental car. Union defendants argue, and the exhibits
23 provided by plaintiffs similarly suggest, that no fees were incurred for cancellation of a rental
24 vehicle. (*See* #133-15) (stating that there is "no charge" for "drop[ping]" the reservation).

25 **4. Interest**

26 The court declines to award interest on the above amounts. Plaintiffs have not provided
27 authority for their entitlement to the same and declined to respond to union defendants' argument
28 on this point.

1 **IV. CONCLUSION**

2 Even under a charitable view, Kapitan's remarks delayed the resolution of this case by
3 over one year,² and extinguished the viability of early resolution through this District's ENE
4 process. Nevertheless, the court remains committed to "the just, speedy, and inexpensive
5 determination . . ." of this matter. *See* Fed. R. Civ. P. 1. As the parties know, the court holds
6 monthly case management conferences, at which it presides over minor discovery disputes that
7 most attorneys who appear in this District are able to resolve themselves. Notwithstanding the
8 on-going difficulties in this case, the court will continue to guide the parties toward a timely
9 resolution.

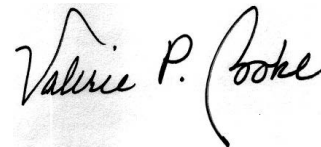
10 Plaintiffs seek \$300,843.60 in fees and costs. For the foregoing reasons, the court reduces
11 the award as described and orders that union defendants shall remit to plaintiffs \$118,720.59.

12 **IT IS THEREFORE ORDERED** that plaintiffs' motion (#133) is **GRANTED IN**
13 **PART**. Union defendants shall pay to plaintiffs \$118,720.59 in attorney fees and costs as a
14 penalty for the conduct of their attorney, Robert B. Kapitan, as described in the court's December
15 2, 2014 order (#124).

16 **IT IS FUTHER ORDERED** that this order is **STAYED** until **Monday, April 20, 2015**.
17 Pursuant to LR IB 3-1(a), a party may file with the District Court an objection to this order within
18 fourteen days of service of the order. If objections are filed, this stay shall remain in effect until
19 the District Court issues its ruling on the objection(s). If no objections are filed, the effective date
20 of this order shall be **Tuesday, April 21, 2015**.

21
22 **IT IS SO ORDERED.**

23 **DATED:** April 2, 2015.



24
25 **UNITED STATES MAGISTRATE JUDGE**

26
27 ² Under the original scheduling order, the discovery cut-off was January 23, 2014. (*See* #37.) As
28 a result of the fracas described in the December order and referenced herein, the discovery cut-off
is now April 21, 2015. (*See* #116.) The parties are reminded that the court shall grant no
extensions of discovery for any reason.